IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDCITION

CRIMINAL APPEAL NO.474 OF 1990

The State of Maharashtra ... Appellant
(Orig. complainant)

Versus

1. Ratan Baburao Randive
2. Surekha Baban Gaikwad ... Respondents
(Orig. Accused
Nos. 1 and 2)

Shri P.S. Hingorani APP for the State

CORAM : D.G. DESHPANDE,
& S.R. SATHE,JJ.
DATED : 19th JANUARY,2007

ORAL JUDGEMENT :- (PER S.R.SATHE,J.)

1. The State of Maharashtra has preferred this appeal against the judgement and order passed by the Court of Second Additional Sessions Judge, Satara whereby the accused were acquitted of the offences punishable under sections 120(b), 363, 366 r/w. 34 of IPC and accused No.1 was also acquitted of the offence punishable under section 376 of IPC and section 57 of Bombay Children Act r/w. 34 of IPC.

2. The brief facts giving rise to this appeal are as under :-

The complainant Shakuntala Zende was residing at Malatan, Taluka Phalatan alongwith her husband and four children. Archana is the eldest daughter of

Shankuntala. Archana's marriage took place on 18/07/1988 with one Babasaheb Sawant. After marriage she started residing with Babasaheb and accordingly, stayed with him at Mumbai for a period of about 4 months. Thereafter, she had gone to Malatan for attending 'Ramyatra'. The accused No.1 was residing just opposite to the house of the complainant. The accused No.2 was residing very near from the house of the complainant. The complainant's daughter Archana often used to go to the house of the brother of accused No.2 for watching television. According to the complainant, accused No.2 in fact used to call Archana at her residence. This was not liked by the complainant because according to her, accused No.2 was not of good character. The complainant had, therefore, warned Archana not to go to the house of accused No.2 and accused No.2 was also asked not to call Archana.

3. On 12/12/1988, brother-in-law of Archana had come to Malatan to take Archana to Mumbai. Both of them were to leave Malatan on 14/12/1988. On 13/12/1988, complainant, her husband and brother-in-law of Archana had gone to Baramati. Complainant's children including Archana had stayed in the house. The complainant returned home on 13/12/1988 at about 7.00 pm. She found

that Archana was not present in the house and other children were weeping. She, therefore, made query with them and they told her that in the afternoon at about 2.30 pm, accused No.2 had been to their house and she asked Archana to accompany her. When younger brother of Archana expressed his desire to accompany them, the accused No.2 gave a slap to him and then, the accused No.2 took Archana out of the house and at that time, Archana's clothes were packed in the bag. After coming to know such information from the children, the complainant started searching Archana. She also noticed that accused No.1 was also not in his house. When complainant went to the house of accused No.2, she told her that Archana had come to canal for washing clothes and she had no knowledge where Archana went thereafter. The complainant searched for Archana at various places but she was not traced. Finally, the complainant lodged the complaint in Phalatan Police Station on 03/02/1989. On the basis of the said complaint, Police registered offence at C.R. No.14/1989. Police traced accused No.1 and Archana at Naigaon on 10/02/1989, the accused No.1 was therefore arrested. Police then sent the accused No.1 as well as Archana to Medical Officer for examination. They also recorded statement of various witnesses. During the investigation it transpired that

on 13/12/1988, Archana was below 16 years of age, her birth date being 23/07/1973. The accused No.1 had taken Archana to Kolhapur Bhuinj. They stayed together and during that period, the accused No.1 forcibly committed sexual intercourse with Archana. After completion of investigation Police submitted charge-sheet against both the accused in the Court of JMFC, Phalatan for the offences mentioned above.

4. Finding that accused were charge-sheeted for the offence exclusively triable by the Court of Sessions the learned JMFC committed the case to the Sessions Court, Satara.

5. The 3rd Additional Sessions Judge, Satara framed charge Exh-4 against both the accused for the offences mentioned above. The charge was read over and explained to the accused. Both the accused pleaded not guilty and claimed to be tried. Their defence is of total denial. The accused No.1 has stated in his statement recorded under section 313 of Cr.P.C. that Archana was in love with him. After her marriage with Babasaheb, he (Babasaheb) came to know about the said fact and hence, he deserted her. According to him, he had no contact with Archana after her marriage. But as she was

deserted by her husband, the complainant filed a false case against him.

6. In order to bring home the guilt of the accused, Prosecution examined in all 8 witnesses consisting of PW-1 complainant Shankuntala Zende Exh-11, PW-2 complainant's husband Kundalik Zende Exh-14, PW-3 Pancha Witness Ananda Chougule Exh-15, PW-4 brother of Archana, Balasaheb Zende Exh-17, PW-5 Archana Baburao Sawant Exh-20, PW-6 PSI Vithal Kulkarni Exh-21, PW-7 Mangal Charegaonkar, Assistant teacher Exh-24, PW-8 Doctor Vinit Mahajan Exh-27.

7. Prosecution also produced certain documents. After considering the evidence adduced by the Prosecution, the learned Trial Judge came to the conclusion that on 13/12/1988, Archana was below 16 years of age. However, the Prosecution failed to prove that she was seduced to accompany the accused. According to learned Trial Judge the evidence of Archana was not trustworthy and there were several contradictions in her evidence. The learned Trial Judge, therefore, held that the Prosecution has failed to prove the charges levelled against the accused. The learned Trial Judge also observed that so far as

alleged offence of rape is concerned, the same is not proved and even if it has taken place it is at Kolhapur that is outside the jurisdiction of the Sessions Court, Satara and as such, the accused can not be convicted in the said trial. Hence on all these grounds the learned Trial Judge acquitted the accused of the offences with which they were charged. The above order of acquittal is challenged by the State in this appeal. Shri Hingorani, the learned APP has urged only two points. Firstly, he submitted that once the learned Trial Judge had come to the conclusion that Archana was below 16 years of age, it was necessary to convict the accused for the offences punishable under sections 363,366,376 of IPC. Secondly, he canvassed before us that when Archana had stated before the Court that she stayed with accused for a period of about 1 month, there was no reason to disbelieve her version when she had specifically stated that during that period the accused No.1 had sexual intercourse with her. Learned APP therefore submitted that the appeal be allowed and accused be convicted. It must be noted that though, both the accused had engaged Advocates, on the date of hearing they remained absent. Hence, relying on the judgement in **Banisingh V/s. State of UP 1996 Criminal Law Journal 3491** we only heard the learned APP for the

State and proceeded to decide the appeal.

8. It is not in dispute that the complainant was residing at Malatan alongwith his husband and four children including Archana. Admittedly, the accused was residing opposite to the house of the complainant. It is also not in dispute that the accused No.2 was residing near from the house of the complainant. Thus, both the accused were in fact acquainted with the complainant and Archana prior to the incident in question.

9. First question which false for consideration in this case is whether on the date of incident i.e. on 13/12/1988, Archana was below 16 years of age. It must be noted that Archana herself has stated that she does not know her birth date but her age is of 17 years. As against this, Archana's mother Shakuntala Zende Exh-11 has stated that her marriage took place about 22 years prior to the date of deposition. Her deposition is recorded on 15/02/1990. So, it means her marriage had taken place some time in the year 1968. She has further stated 15 months after her marriage she gave birth to her first daughter i.e. Archana. If it is so, then Archana's birth must have taken place some time in the

year 1970. Then in that case, Archana was about 18 years of age on the date of incident. However, the complainant's husband Kundalik Zende Exh-14 has specifically stated that he has noted birth dates of all his children in a diary. According to him, the birth date of Archana is 23/07/1973. However, it is worth to note that he has not produced the said diary. It is pertinent to note that though this witness has stated specific dates as dates of birth of his children he himself was unable to tell the date of his marriage. So, under such circumstances, it is not at all safe to rely on the testimony of witness Kundalik Zende so as to hold that the birth date of Archana is 23/07/1973.

10. Learned APP submitted that the Prosecution has produced the birth extract at Exh-13 wherein her birth date is shown as 23/07/1973. However, it must be noted that there is nothing on record to show that the person giving information about the said date had in fact knowledge and was in close relations of Archana. Besides this, Exh-13 is not the original birth certificate. But it appears to be carbon copy. No explanation is coming forward as to why the original is not produced or under what circumstances secondary evidence is adduced. So, under such circumstances, it is not safe to rely on the said extract.

11. The Prosecution has examined PW-7 Mangal Charegaonkar, Assistant teacher from school No.2 Phalatan. She has stated that birth date of Archana is shown in their school register as 23/07/1973. However, she has clearly admitted in cross-examination that at the time when Archana was admitted in the school, there was no definite method for recording birth date of the student in their school. Whatever date parents used to tell they used to write. In the instant case, the register in fact does not indicate as to who actually gave the information regarding the birth date. Admittedly, signature or thumb impression of the person

giving the information is not obtained on the register or any form. So, under such circumstances, it can not be said that the Prosecution has proved that the said entry is authenticated.

12. It is pertinent to note that Archana was sent to medical examination for ascertaining her age. Doctor Vinit Mahajan Exh-27 has stated that on the basis of radiological examination the age of Archana at the relevant time was between 16 to 18 years. So, this medical evidence does not support the birth date mentioned in the birth certificate and the school record. There is also discrepancy in the evidence of complainant and the other evidence. So, taking into consideration all these factors we are of the view that the Prosecution has in fact failed to prove beyond reasonable doubt that on the date of incident, Archana was below 16 years of age.

13. It is the case of the complainant that on 13/12/1988 at about 7.00 pm, when she returned home her children told her that accused No.2 took Archana with her in the afternoon and thereafter, she started searching Archana. She went to the house of accused No.2 and accused No.2 was present in the house and she

told her that in the afternoon Archana had come to canal for washing clothes and she had no knowledge as to whether she went thereafter. We find that inspite of the same, the complainant did not approach the Police immediately. On the contrary, we find that there is inordinate delay on the part of the complainant in filing the complaint. She has lodged the complaint on 03/02/1989. She has tried to give explanation about the said delay by saying that as Archana was married and there was question of their reputation, she did not file the complaint immediately. It is true that in such cases the issue is pertaining to the character and reputation and the entire matter is very sensitive. But that does not mean that the person can wait for indefinite period or unreasonable period. In the instant case, the complaint is lodged after a period of about 51 days which in our opinion, not satisfactorily explained. So, this delay in lodging the FIR creates grave doubts about the prosecution version.

14. If we peruse the said complaint Exh-12 then we find that the name of accused No.2 is not all mentioned in the said complaint. Not only that admittedly though in Court Complainant has stated that she came to know about the incident from her children in the FIR Exh-12

she has not stated accordingly. So, there is material omission in that behalf also. What is more to be noted is that the evidence of Archana is also not consistent. At one stage, she has stated that 8 days prior to the incident, it was decided between accused No.1 and her to go to Kolhapur but she has not stated that it was decided between accused No.2 and accused No.1 that the accused No.2 should bring Archana from her house. In fact, Archana has stated in her deposition that on that day, she on her own accord went alongwith the accused No.2 out of the house. When such is the position of the evidence adduced by the Prosecution, we have no hesitation to hold that the Prosecution has failed to adduce any cogent, consistent and convincing evidence to prove the alleged offence of conspiracy.

15. It is needless to say that out of 8 prosecution witnesses except Archana no other witness is having any specific knowledge as to the places where accused No.1 had taken Archana. She has stated that on 13/12/1988, she on her own accord left the house and went to Akrud. From there, she and accused No.1 went to Satara in S.T. Bus. In her examination-in-chief, she has stated that the accused No.1 at the relevant time pointed out knife and gave threat and as a result of the same, she did

not raise any shout or make any complaint. However, while answering to the Court Question she has specifically admitted that she has falsely stated that accused gave such threat. What is more to be noted is that from the subsequent events also it is crystal clear that such threat must not have been given. According to Archana on 13/12/1988 first the accused No.1 took her to Satara from there she was taken to Bhuinj. At that place they stayed in one garage of Lohar. On the next day, from Bhuinj accused No.1 took her in a truck to Kolhapur at his maternal aunt's house and there they stayed for a period of one month. She has also stated that accused No.1 introduced her to his maternal aunt as his wife. She has also stated that during that period practically every day accused No.1 used to have sexual intercourse with her against her will. By no stretch of imagination, it can be said that accused was doing the alleged intercourse against the will of Archana. It must be noted that she has stated that during the said period of one month accused used to go to his work at MIDC at 8.00 am and return at 8.00 pm. So, if really the accused had forcibly taken her from Malatan and thereafter, forced to have sexual intercourse with him then certainly she would have made grievance. There was ample opportunity for her either

to run away from the said place or to make complaint to somebody or to police. But that has not happened. It must be noted that while answering to the Court Question, she has in fact stated that she was in love with accused No.1 and though, her marriage had taken place with Babasaheb she was not willing to stay with him. He was disliked by her. She has also stated that she and accused No.1 had decided to marry at Kolhapur. Thus, we find that the evidence of Archana is in fact not consistent. She is changing her version from time to time. Then it must be noted that the Prosecution has not examined the maternal aunt of accused No.1 at whose place the accused No.1 and Archana had stayed. Similarly, the Prosecution has also not examined the owner of the garage at Bhuinj though, it is alleged that accused No.1 and Archana had stayed in his garage. No satisfactory explanation is given by the Prosecution as to why those material witness have not been examined. They could have certainly thrown some light regarding the presence of accused No.1 at their residence alongwith Archana.

16. Dr. Vinit Mahajan Exh-27 has stated that on medical examination of Archana he did not find any injury to her private part. He has, however, opined

that the said woman was habituated to sexual intercourse. We can not ignore the fact that after marriage, Archana was residing with her husband for a period of about four months. So, considering all these facts, medical evidence in the instant case is also of no use to the prosecution to prove the charge levelled against the accused.

17. Having regard to the entire evidence that has been adduced by the Prosecution it is very clear that the Prosecution has failed to prove beyond reasonable doubt that the accused induced Archana to leave her home and accompany him or stay with him. There is no cogent and convincing evidence against accused No.1 about alleged act of kidnapping or abduction and rape. There is nothing on record to show that finding of acquittal recorded by the learned Trial Judge is unreasonable, improbable, perverse or illegal. It is, therefore, not necessary to interfere with the said finding. Hence, we pass the following order :-

O R D E R

The appeal is dismissed.

The bail bonds of the accused stand cancelled.

(D.G. DESHPANDE,J.)

(S.R. SATHE,J.)